UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

UPMC AND ITS SUBSIDIARIES UPMC PRESBYTERIAN SHADYSIDE and MAGEE-WOMENS HOSPITAL OF UPMC, SINGLE EMPLOYER, D/B/A SHADYSIDE HOSPITAL AND/OR PRESBYTERIAN HOSPITAL AND/OR MONTEFIORE HOSPITAL AND/OR MAGEE-WOMENS HOSPITAL

and Case 06-CA-081896

SEIU HEALTHCARE PENNSYLVANIA, CTW, CLC

ORDER DENYING MOTION FOR RECONSIDERATION AND TO REOPEN THE RECORD[1]

The Respondents' motion for reconsideration of the Board's Decision and Order reported at 362 NLRB No. 191 (2015) and to reopen the record is denied. In their motion "seek[ing] reconsideration of every adverse finding in the Board's Decision," the Respondents argue at length why they disagree with the Board's decision, but they have neither identified any material error nor demonstrated extraordinary circumstances warranting reconsideration under Section 102.48(d)(1) of the Board's Rules and Regulations.[2] Nor have the Respondents identified any basis, under that same section, why the record should be reopened.[3]

[1] The General Counsel and Charging Party each filed an opposition to the Respondents' motion. The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The Respondents argue, among other things, that in finding their Solicitation Policy unlawful, the Board incorrectly relied on and applied *Purple Communications, Inc*., 361 NLRB No. 126 (2014). The Respondents contend that *Purple Communications* was wrongly decided, that it should not have applied retroactively, and that, in any event, the Board should have remanded this case so that the Respondents could have presented further evidence regarding "special circumstances" under *Purple Communications*. However, we have previously addressed

the Respondents' arguments. See *UPMC*, 362 NLRB No. 191, slip op. at 2-5, and see fn. 3, below.

In addition, the Respondents argue that we incorrectly found that their Electronic Mail and Messaging and Acceptable Use of Information Technology Resources policies are unlawful. Here, the Respondents are merely asking us to revisit the factual and legal bases for our findings. Such disagreements do not constitute grounds for reconsideration under Sec. 102.48(d)(1). See, e.g., *Pressroom Cleaners*, 361 NLRB No. 133 (2014).

[3] In relevant part, Sec. 102.48(d)(1) states as follows:

> A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

The Respondents assert that the record should be reopened so that they can present a named witness "and others" whose testimony "bears directly on the issue of special circumstances" under the Solicitation Policy. They claim that they did not previously submit the evidence "because *Purple Communications* had not yet been decided." This argument is unavailing. As we explained in the decision in this case, the Respondents were on notice that the issue was before the Board in *Purple Communications*, the Respondents had sufficient incentive to litigate the issue fully, and they did, in fact, litigate the issue. *UPMC*, supra, slip op. at 4. As we further explained, the Respondents submitted a letter after *Purple Communications* issued, and this letter did "not claim that they [had] any new arguments to advance and identifie[d] no additional evidence they might [have] present[ed] if remand were granted." Id. Thus, the Respondents have failed to present a sufficient explanation why they did not previously present the evidence. Nor do they argue that the evidence is newly discovered. And finally, the Respondents have failed to explain why the evidence, "if adduced and credited . . . would require a different result." In sum, they have not established a basis for reopening the record. Contrary to the dissent, the Respondents' failure to make the required showings does not result from a lack of opportunity or a lack of incentive to meet their burden. Rather, having attempted repeatedly, but without success, to support their arguments, the Respondents simply seek another bite at the apple.

Member Miscimarra would grant the Respondents' motions. He would grant the motion for reconsideration based on the Board's failure to remand the case to provide an opportunity for the Respondents to litigate whether special circumstances privilege their Solicitation Policy. And he would grant the motion to reopen the record because, in his view, the Respondents were unreasonably denied the opportunity to introduce evidence of special circumstances on remand. Member Miscimarra notes that, in *Purple Communications*, the Board promised that it would give employers the opportunity to demonstrate special circumstances, and that promise was not kept here. See *Purple Communications*, 361 NLRB No. 126, slip op. at 17 ("In the present case, we will remand this issue to the judge to allow the [r]espondent to present evidence of special circumstances justifying the restrictions it imposes on employees' use of its email system. Other employers with email restrictions affected by today's decision will similarly have an opportunity to rebut the presumption."). As former Member Johnson pointed out in his partial dissent from

Dated, Washington, D.C., December 5, 2016.

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Lauren McFerran, Member

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the Board's earlier *UPMC* decision: "This case was litigated under the then-extant *Register Guard* standard. Pre–*Purple Communications*, the Respondent[s] had minimal incentive to litigate and proffer evidence on this issue . . . . the Respondent[s] cannot be faulted for failing to fully litigate an issue under a standard that did not exist at the time of the hearing . . . ." *UPMC*, 362 NLRB No. 191, slip op. at 11 (Member Johnson, dissenting in part).

Although Member Miscimarra agrees that the Respondents have not otherwise established grounds for reconsideration or reopening the record, he disagrees with the merits of the Board's earlier decision in other respects. Specifically, he adheres to his dissent in *Purple Communications*, and in determining whether the other rules at issue in the case were lawful—the Electronic Mail and Messaging Policy and the Acceptable Use of Information Technology Resources Policy—Member Miscimarra would apply the standard he set forth in *William Beaumont Hospital*, 363 NLRB No. 162 (2016), under which a facially neutral rule should be declared unlawful only if the legitimate justifications for the rule are outweighed by their adverse impact on Sec. 7 activity. Id., slip op. at 9 (Member Miscimarra, concurring in part and dissenting in part).